No. 3588

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE TERRITORY OF HAWAII TO REGISTER AND CONFIRM ITS TITLE TO THE AHUPUAA OF KIOLOKU, IN THE DISTRICT OF KAU, ISLAND AND COUNTY OF HAWAII, TERRITORY OF HAWAII.

THE TERRITORY OF HAWAII, APPELLANT,

vs.

HUTCHINSON SUGAR PLANTATION COMPANY, APPELLEE.

BRIEF OF HUTCHINSON SUGAR PLANTATION COMPANY, APPELLEE

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SUBJECT INDEX.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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STATEMENT OF THE CASE.

On the 2d day of August, 1913, the Territory of Hawaii filed its petition in the Land Court of Hawaii for the purpose of having its alleged title in and

to the Ahupuaa of Kioloku, District of Kau, Island of Hawaii, registered (Transcript of Record, p. 15). The only opposing claim filed was that of the Hutchinson Sugar Plantation Company, now appellee, which denied the alleged title of the Territory and asserted ownership of the land in fee simple in itself (Transcript, p. 21). The Government showed no disposition to press its claim and nothing further was done in the case until some time in October, 1918, when a motion was filed asking the court to set a day for the hearing of the case. The hearing was commenced on October 21st, 1918 (Transcript, p. 60).

The Territory claimed title to the Ahupuaa in question as an "unassigned" land; that is to say, a land which is not mentioned in the record of the Great Mahele of 1848, in and by which all the large lands of the Hawaiian Kingdom were intended or supposed to have been assigned and set apart in severalty to and between the King, the chiefs, and the Government, respectively, though, in fact many were omitted or not mentioned. The contention of the Territory was and is that all tracts of land not expressly listed as having been so set apart to a chief and/or subsequently awarded by an award of the Land Commission in the exercise of its functions under the statute of 1845, or conveyed by government grant or patent, became or remained the property of the Government.

The claimant, Hutchinson Sugar Plantation Company, asserted title in fee simple under a Land Commission award which, under the circumstances shown to have existed, must be presumed to have been made to the High Chiefess Ane Keohokalole. The common-law presumption of a transfer of title upon proof by secondary evidence was relied on.

The evidence for the Government on its case in chief consisted of the testimony of one S. M. Kanakanui, who had been for about thirty years in the service of the Bureau of Government Survey (Tr., p. 78). He testified to having searched the records of the Land Commission and the Privy Council of the former Kingdom without finding any record of or reference to the land of Kioloku. He found records of a Mahele and Land Commission awards of other lands to Ane Keohokalole, and to her husband, the Chief C. Kapaakea, but none of the land in question (Tr., pp. 78-83). He also testified that the Ahupuaa of Kioloku was not mentioned in the Mahele records, and, later, a record showing a Mahele to Keohokalole was introduced (Exhibit F, Tr., pp. 315-318), but therein the land of Kioloku was not enumerated. The witness testified to having made a very careful search of the records of the Privy Council. But those records are of secondary importance compared with those of the Land Commission, for it would be in the latter and not the former

that the evidence of an award would naturally be found. The Hawaiian Privy Council did not and had no power to award titles. The witness further testified that he searched for, without finding, a royal patent or grant or Government deed covering this land. The search made by the witness of the records of the Land Commission was not "page by page," as in the case of the Privy Council records, and the witness admitted that in making the search he was working on Government titles generally and not looking for Kioloku specially (Tr., pp. 87-89). Mr. Kanakanui explained that over eleven thousand awards were issued by the Land Commission, and that one award may cover as many as fifty separate pieces of land; that since in some cases no award was issued on a claim some numbers are missing from, or were not included in, the numerical list of awards; that in some cases the numbers were changed and others substituted, and that there may be extant numbered awards of which there is no present record (Tr., pp. 89-91). Reference to the "Kuleana Book," an official publication of which the Hawaiian courts and presumably this Court will take judicial notice, shows that (to add to the difficulty) the Land Commission in many instances used letters of the alphabet to distinguish awards having the same numerical designation. For instance, in the district of Kau, Island of Hawaii, L. C. A. 8559 was

issued to Lunalilo for a parcel of land at Honuapo; L. C. A. 8559B was issued to Lunalilo for several Ahupuaas. We find no L. C. A. 8559A nor L. C. A. 8559C. Can any one say none such were ever issued? L. C. A. 8559C may have been issued to Keohokalole for the Ahupuaa of Kioloku. We find in the same district L. C. A. 8760, 8760C, 8760D, 8760E, and 8760H. Where are 8760B, 8760G, and 8760I? We find L. C. A. 7606B, 7606C, and 7606D. Where is 7606E? Even double letters of the alphabet were used. For example, in the district of Kona, there is L. C. A. 5561BB, and in Hamakuapoko, Maui, we find L. C. A. 6510TT. There are many others.

Under these circumstances the most that Mr. Kanakanui or any other searcher could say is that he has been unable to find an award of the Ahupuaa of Kioloku. No truthful witness could ever say that the Land Commission never issued an award upon that land. There remains the possibility, therefore, that evidence of an award of Kioloku to Keohokalole actually exists in the records of the Land Commission. (See decision of Land Court, Tr., p. 34.)

The Land Court, however, seemed to regard that testimony as constituting a *prima facie* showing that Kioloku was an "unassigned" land (Tr., pp. 92, 93). The duty to go forward with the evidence therefore passed to the claimant, and the burden was fully discharged by a strong showing of facts, circumstances

and events the sum total of which could be accounted for and explained only on one reasonable theory, and that was that the land had been in fact awarded to Ane Keohokalole by the Land Commission, though record evidence thereof cannot now be produced. The case was tried upon the theory that no record or original evidence of an award or other title from the Government can now be found.

The case for the claimant consisted partly of facts admitted by the Territory and partly of evidence which was practically undisputed. The claim asserted rested upon the long-continued and uninterrupted possession of the land, accompanied by the usual acts of ownership, of the Hutchinson Sugar Plantation Company and its predecessors in title and occupancy, plus the assessment and payment of government taxes by the respective occupants, supplemented and reinforced by a chain of circumstances which pointed unerringly to the fact of private ownership of the land which must have had its source in an award of the title by the Land Commission before it finished its labors in 1855.

Judge De Bolt, of the Land Court, in a lucid and illuminating decision sustained the contentions of the claimant (now appellee) all along the line and denied the petition on the ground that the Territory had not shown title.

The Territory had the option to take an appeal to

the Circuit Court with a jury on the theory that there were disputed facts involved, or to carry the case to the Supreme Court upon points of law on a writ of error. Act 48, S. L. 1919. It chose the latter course. The decree of the Land Court was affirmed.

In the Supreme Court any disputed facts were, of course, resolved in favor of the decree of the Land Court and against the plaintiff in error.

Section 2522 of the Revised Laws of Hawaii, 1915, as amended by Act 44, Session Laws of 1919, provides that upon a writ of error "there shall be no reversal * * * for any finding depending on the credibility of witnesses or the weight of evidence."

Colburn *v.* Long, 21 Haw., 428, 430.
Akatasuka *v.* McKay, 24 Haw., 600, 604.
Kaleiheana *v.* Keahipaka, 23 Haw., 169, 171.
See McCandless *v.* Du Roi, 23 Haw., 51, 54.
Also, opinion of Supreme Court in this case, Tr., p. 253.

The proper method of bringing a case of this kind to this court is by writ of error, and not an appeal as has been done in this case.

Carino *v.* Insular Government, 212 U. S., 449.
Tiglao *v.* Insular Government, 215 U. S., 410.
Jover *v.* Insular Government, 221 U. S., 623.

This court, however, will consider and dispose of the case as though it had been properly brought upon a writ of error. That is to say, it will not review facts or reconsider the conclusions of the lower court which find any support in the record.

Gauzon *v.* Compania General, 245 U. S.,·86.

The distinction between the scope of review upon writ of error and appeal is well settled in Federal practice. Upon a writ of error the review is limited to a consideration of alleged errors of law.

Gauzon *v.* Compania General, *supra.*
Behn, Meyer & Co. *v.* Campbell, 205 U. S., 403.
Nashville R. & L. Co. *v.* Bunn, 168 Fed., 862.

Some portions of the appellant's brief seem to proceed upon the mistaken theory that the facts can be reviewed by this court.

THE EVIDENCE.

Re Possession: The evidence shows that on June 14, 1860, Kapaakea and Keohokalole, the parents of D. Kalakaua, conveyed all their real and personal property to one C. R. Bishop as trustee for creditors with power and directions to collect the income and apply it to the payment of the debts of the grantors (Ex. 11, Tr., p. 337). Probate Record No. 1839,

which covers the administration of the intestate estates of both Kapaakea and Keohokalole, who died respectively in 1866 and 1869, the latter having been administratrix of the former, shows that Mr. Bishop, as trustee, accounted to J. O. Dominis, administrator of both estates, for a balance of $226.14 in cash (Tr., pp. 168, 171), the trustee's account showing how the balance was reached, being part of the record (Tr., p. 171). The account shows the regular receipt of rent from one Martin for the land of Kioloku in semi-annual payments covering the years from 1861 to 1868, inclusive (Tr., pp. 172-175). This evidence, which is as good as could be expected to be obtained at this day, shows that the trustee was in possession of the land in question during the period mentioned. In 1870 the administrator filed his final account and received his discharge from the probate court, and at the same time a partition deed was made between the heirs at law of Keohokalole (all of whom had died before this case was tried), by which the several tracts of land of which Keohokalole died seized and possessed were divided between them, the Ahupuaa of Kioloku being among the lands set off to David Kalakaua (afterwards King Kalakaua). See Tr., pp. 170, 179, and Ex. 12, Tr., p. 343. The Territory admitted that from the date of the partition deed, July 1, 1870, to the present time Kalakaua and his successors in interest (including the present claim-

ant) have held actual, open, continuous, uninterrupted and adverse possession of the land, using it for the purposes for which it is adapted, namely, for the cultivation of sugar cane and for the pasturage of stock (Tr., pp. 76, 77, 129, 130). This adverse possession, therefore, had been maintained for a period of at least fifty-two years prior to the commencement of this proceeding in court. We need to draw upon inference only for a period of six years to carry that possession back to the time when the Land Commission could have made an award of the title to Keohokalole. The Commission concluded its work in 1855.

Re Payment of Taxes: The Territory admitted that the land has been assessed by several governments—the Monarchy, Provisional Government, Republic of Hawaii, and the Territory—to, and the taxes thereon paid by the successive occupants since 1870 to the present time (Tr., pp. 77, 78). The successive successors in interest of Kalakaua, and the dates of the several conveyances of this land are as follows:

Deed of Kalakaua and Kapiolani, his wife, to O. B. Spencer, December 13, 1873, recorded in Book 38, page 438.

Deed of O. B. Spencer to A. Hutchinson, May 12, 1874, recorded in Book 39, page 323.

Deed of Executors Estate of A. Hutchinson to C.

Spreckels and W. G. Irwin (copartners W. G. Irwin & Co.) February 28, 1881, recorded in Book 76, page 2.

Release of Dower, widow of A. Hutchinson to Claus Spreckels, April 30, 1880, recorded in Book 65, page 78.

Deed of W. G. Irwin & Co. and J. D. Spreckels & Bros. to Hutchinson Plantation Company, an Hawaiian corporation, November 23, 1884, recorded in Book 93, page 16.

Deed of Hutchinson Plantation Co. to Louis Sloss, June 1, 1889, recorded in Book 119, page 120. The date of this deed is erroneously stated in the transcript (p. 182) as June 1, 1890.

Deed of Louis Sloss to Hutchinson Sugar Plantation Company, a California corporation, June 11, 1889, recorded in Book 118, page 376 (Tr., pp. 179-182).

The Land Court found that the record title from Kalakaua to the claimant was complete (Tr., p. 36).

Supporting Facts and Circumstances: In addition to the assessment and payment of government taxes on the land for the period of forty-three years prior to the filing of this action, and in support of the long-continued adverse possession as evidence of an award of the title to the land, the evidence disclosed a number of corroborative circumstances of more or less cogency, as follows:

On April 8, 1852, the only kuleana within the

Ahupuaa of Kioloku was awarded by the Land Commission to one Kekahuna by L. C. A. 9659 (Tr., pp. 96, 98. Ex. 2). The diagram of the lot so awarded, as incorporated in the certificate of award and exhibited in the Land Court, shows a four-sided parcel of land bounded on each side by "Konohiki" land. The kuleana was located on and the diagram transposed to a plan made by the witness G. F. Wright (Tr., pp. 114, 115; Ex. 9, Tr., p. 334). This, we contend, shows the understanding of the surveyor who surveyed and described the kuleana, and the understanding of the Land Commission itself, that the kuleana was situated within and surrounded by privately owned land. In other words, it is evidence of the common knowledge of the time, of those who were in a position to know, that the title of Kioloku had either passed into private ownership by an award already made by the Land Commission, or, at least, had been assigned to some chief in and by the Mahele of 1848, so that that chief was then in a position to obtain a Land Commission Award of the Ahupuaa for the asking. The admission of this evidence gave rise to quite a controversy as to the meaning of the word "Konohiki." (Tr., pp. 116, 135, 196, 223, 230.)

Mr. Wright testified that the word "Konohiki" as used in old surveys indicated "privately owned lands" (Tr., p. 116), and that though in some instances the word had been applied to government

land, "it is not properly or correctly" so used (Tr., p. 163).

Mr. Emerson said "I have never heard the name konohiki applied to the government lands" (Tr., p. 135); that "konohiki land" meant other than government land (Tr., p. 138); and that "konohiki land" is "land owned by a person who has that land distinguished from general land which is the government land" (Tr., p. 142).

Mr. Kanakanui explained that "aupuni" is the proper designation of government land, and "konohiki" of a chief's land (Tr., pp. 229, 230); that government lands and konohiki lands are separate and distinct classes of land (Tr., p. 233); and he wisely said that the correctness of the use of the different terms depended largely on the accuracy of the knowledge of the surveyor (Tr., p. 236).

The map of Kioloku (Exhibit 9) shows that the kuleana of Kekahuna, though lying entirely within the Ahupuaa of Kioloku, adjoins on one of its sides the Ahupuaa of Honuapo which is conceded to be a privately owned land (having been awarded to Lunalilo) (Tr., p. 15), and, as we contend, was properly referred to as "Konohiki" land. The statement in the diagram in the award that the other three sides of the kuleana also adjoin "Konohiki" land is therefore evidence that Kioloku was then known as similar kind of land to Honuapo, namely, pri-

vately owned land, and not "unassigned" or "government" land which would have been properly designated by the term ordinarily used with reference to such land, to wit, "Aupuni." "Konohiki," as applied to individuals, originally meant the person in immediate charge of the land on behalf of the King or Chief. But after the Mahele, when lands came under private ownership, the word was applied to the chief or other person to whom an Ahupuaa had been assigned or awarded. But the use of the term as applied to individuals is not important here. The word "Konohiki" as an adjective applied to land (in contradistinction to the noun aplied to individuals) had but one signification, and that was that the land had passed into private ownership, and by such designation such land was differentiated from "Aupuni" (Government) land. And hence the well-known classification of lands in Hawaii: (1) Government land, (2) Crown land, (3) Konohiki land, and (4) the kuleanas of the common people. And hence also the significance of a surveyed description of a kuleana showing it as bounded by "Konohiki" land, meaning a chief's land, or "Aupuni," meaning "Government land." Our contention in this respect was fully sustained by the opinion of the Supreme Court (Tr., p. 249).

On December 14, 1859, Royal Patent Grant 2656 in Kaunamano was issued to one Kaiahua (Tr., pp.

98, 99, Ex. 3). The description of that piece of land adjoins "Kioloku" on one side, and on another it runs along "Aupuni," referring to the Ahupuaa of Kaunamano, which is conceded to be Government land (Tr., pp. 116, 118). The survey of that land, therefore, sharply differentiates between "Kioloku" on the one hand and "Aupuni" (Kaunamano) on the other, and shows that Kioloku at that time was understood not to be Government land.

On May 1, 1861, Royal Patent Grant 2748 was issued to one Kaleiku (Tr., pp. 101, 102, Ex. 4). One of its sides is bounded by the land in dispute and it is designated in the grant as "Kioloku," but not as "Aupuni" (Tr., p. 120). The weight of this piece of evidence lies in considering it in connection with the descriptions contained in the surveys of neighboring lands whereby it appears that whenever the land adjoins Government land the survey invariably refers to the adjoining land as "Aupuni" or "Government."

On October 14, 1873, the record of the Boundary Commissioner for the Third Judicial Circuit (R. A. Lyman) shows a proceeding brought under the statute for the settlement of the boundaries of lands which had been awarded by their ancient Hawaiian names, without surveyed descriptions. That proceeding was had upon the application of David Kalakaua (who claimed title through the above-men-

tioned partition deed) for the settlement and adjudication of the boundaries of the Ahupuaa of Kioloku. The record shows that the owners of the adjoining lands had been notified of the proceeding as required by law. In response to the notice, as appears by the Commissioner's record, His Majesty King Lunalilo (owner of the adjoining Ahupuaa of Honuapo) represented by J. G. Hoapili, and the Government (owner of the adjoining Ahupuaa of Kaunamano) represented by W. T. Martin, appeared. The hearing proceeded, testimony was taken and a judgment defining the boundaries of the land by a surveyed description was entered and Boundary Certificate No. 57 issued thereon (Tr., pp. 102-106, Ex. 5 and 6). We do not contend that that judgment has the force of res judicata upon the title to the land in dispute since title, strictly speaking, is not in issue in such a proceeding, but it is next door to that because the respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku.

In Vanfleet's Collateral Attack, Sec. 63, p. 93, the author says: "I am unable to conceive of any case where a party in court would not have the right to controvert the jurisdictional facts as well as others. He is called into court to show any cause

of defense he may have why that particular court should not grant the relief prayed for, and if he shows no cause, the granting of the relief is conclusive that he has none. If that were not so, then the validity of a judgment would depend on the volition of the defendant who, instead of having his day in court would have two." See also, 15 R. C. L., Sec. 451. But whether the decision of the Boundary Commissioner had the force and effect of res judicata or not it is clear that the appearance of the Government and its submission to the jurisdiction of the Commissioner constituted an admission that Kalakaua was the owner of the land, and, as such, is evidence against the present Government in this case. And we believe that is enough for our purposes here.

No objection having been made by either of the parties to the hearing it amounted at least to an admission on the part of the then King, as the owner of Honuapo, and of the Government, as the owner of Kaunamano, that Kalakaua had the right to maintain the proceeding as the owner of the land of Kioloku. We regard this piece of evidence as highly important and of great probative force because all the parties concerned in that proceeding—the Commissioner, the King, and the Government's representative—were in a position to personally know the ownership of the land and the precise status of the title,

knowledge which has passed beyond the reach of people now living and who are necessarily obliged to follow theories and rely upon presumptions in the absence of direct proof of the vital facts.

In this connection we may refer to the decision of the Supreme Court of Hawaii in the Paunau case, 24 Haw., 546, the first paragraph of the syllabus of which reads: "A boundary commissioner is authorized to decide and certify boundaries only upon the petition of an owner and his jurisdiction exists only in cases where the petitioner's ownership of the land claimed in his petition is not contested." The failure of the Government in the proceeding before Commissioner Lyman in 1873 to oust his jurisdiction by disputing Kalakaua's ownership of Kioloku constituted an admission that Kalakaua owned the land. The boundaries of the land were conclusively settled. The admission, we think, does not constitute an estoppel here because the subject matter was different. The admission, however, is evidence in this case, as any admission of title either in or out of court would be, to be taken into consideration with all the other facts in evidence. Subsequent purchasers of the land had the right to rely on that admission.

The evidence was also admissible on the other permissible theory, if it needs to be resorted to, viz., that by some agreement or compromise entered into at that time Kalakaua's claim to Kioloku was recog-

nized as valid in consideration of the withdrawing of his claim to the other six pieces of land named in his application.

The appellant's claim that Kioloku is an "unassigned" land rested upon the negative testimony of a single witness, who testified that he searched the records and found no formal evidence of private ownership. The Government's case, therefore, rested upon a very meagre *prima facie* showing. If the contestant had produced an award, patent, or grant of the land, that, of course, would have been the end of the case. But the inability of the contestant to produce such original and primary evidence of title did not end the case by any means. Secondary or circumstantial evidence was admissible. Any and all evidence which tended to show how the land had been claimed, held, used, and treated by the respective possessors, and how it has been regarded, treated, referred to, and described by the Government and its representatives was admissible.

On April 27, 1875, the same Commissioner (R. A. Lyman) issued Boundary Certificate No. 74, defining the boundaries of the Ahupuaa of Honuapo (Tr., pp. 107, 108, Ex. 7). It will be observed that the survey of that land, where it runs along the land of Hionaa, which is a Government land (Tr., p. 121), designates it as "Gov't land," whereas where it runs along Kioloko there is no such designation, thus differen-

tiating between the character of the two lands and showing that Kioloku was then known not to be Government land. (See Tr., pp. 120-124, Ex. 9; Tr., p. 334.)

On June 14, 1876, the same Commissioner issued Boundary Certificate No. 91, defining the boundaries of the Ahupuaa of Waiohinu (Tr., pp. 109-111, Ex. 8). The surveyed description of that land shows that where it adjoins the lands of Kahaea, Kiolokaa, Kaalaiki, and Kaumamano, all of which are admittedly Government lands (Tr., pp. 119, 126-128), the designation "Gov't land" is made in each case (see courses 20 to 24, 33, 34, and 67), whereas in one of the courses (34th), which refers to the land of Kioloku, that land is not designated as Government land, thus again distinguishing between Government and privately owned land (Tr., pp. 124-128). These two boundary certificates and the two grants above referred to show the consistent practice of the surveyors to designate Government lands, whenever they were mentioned as boundaries, as "Government" or "Aupuni," and though the land of Kioloku is referred to in all of them it is in none of them called "Government" or "Aupuni." While no one of these pieces of evidence, taken alone, would be regarded as conclusive, their combined force is irresistible. It shows the common understanding of the people, who were thoroughly posted and intimately

concerned during the period from 1859 to 1876 that the land of Kioloku was not Government land, but, conversely, was land which had passed into private ownership, and hence was properly referred to as "Konohiki" land or simply by name. Matters pertaining to original titles which were common knowledge then are but imperfectly understood at this time, for much of that knowledge and understanding, unfortunately, was not made matter of record for the use and enlightenment of posterity.

In the absence of an award or patent from the Government we were entitled to adduce any competent secondary evidence. The presumption upon which we relied and which the courts below applied arises out of circumstantial evidence. We were entitled to put in evidence tending to show that the Land Commission knew and understood that Kioloku was private land; hence L. C. A. 9659 was admissible. We were entitled to show that the King and Minister of Interior knew and understood that Kioloku was private land; hence the royal patents were admissible. We were entitled to show that the Boundary Commission knew and understood the same thing, hence the two boundary certificates were admissible. And it has been expressly held that such evidence is admissible in cases of disputed title.

In re Pa Pelekane, 21 Haw., 175, 186.

In 1879 one F. S. Lyman made a survey of a portion of the District of Kau, including the locality in which the land of Kioloku in situated (see Tr., pp. 164-167, Ex. 10, Tr., p. 335). On this map, which was numbered 575 and which came from the custody of the Government, he designated the lands of Kaunamano, Hionaa and Kaalaiki as "Government," as they undoubtedly were and are, whereas the intervening Ahupuaas of Honuapo and Kioloku were given no such designation, thus showing his understanding that those two lands did not belong to the Government. In other words, the three admittedly Government lands were uniformly designated, while Kioloku was treated the same as Honuapo, which is admittedly privately owned. Mr. F. S. Lyman, who was a brother of the Boundary Commissioner, Mr. R. A. Lyman, and who had worked with the Land Commission, was undoubtedly very familiar with land titles in those early days. His map is entitled to much weight. A note written in pencil on his map on the land of Kioloku, "No title," cannot be regarded as a legitimate part of the map, having been made by another person (Prof. Alexander) at an unknown time (Tr., p. 185). The Land Court so ruled at the hearing (Tr., pp. 166, 167).

What does "No title" mean? In law, of course, there is no such thing as a piece of land with no title. There must be title in some one. The statement "No

title'' without more means nothing. It could as well be claimed that it meant that the Government had no title as that Obadiah Spencer or any one else had no title. As a matter of fact, the statement is so vague that no importance could be attached to it, even if it were in evidence.

In rebuttal, the territory introduced in evidence three maps of Kau District from its own custody, which were admitted over the objections of the claimant (Tr., pp. 188-192). The first was compiled by J. F. Brown in 1885, the second was made by M. D. Monsarrat in 1887, and the third was compiled by F. S. Dodge in 1894 (Ex. A, B, and C, Tr., pp. 298-300). On the first and third the land of Kioloku is designated by color as Government land, while on the second Kioloku is similarly designated as unassigned land. Those maps, we contend, are merely self-serving evidence and as such entitled to little or no weight. The first and third purport to have been "compiled from," among other data, the above-mentioned map of F. S. Lyman, whereas they attempt to overrule Mr. Lyman's understanding that Kioloku was not Government land. By what authority or upon what information the compilers did that we have no means of knowing. We had no opportunity to cross-examine the makers of the maps. Of all the four maps which came from the Government Bureau of Survey certainly the one made by the late Mr.

Lyman, being the older and a declaration against interest, is the better authority. That this is so is shown by the report of the head of the Bureau of Survey, to which we now refer.

On January 9, 1888, W. D. Alexander, Surveyor General under the Government of the Monarchy, in response to a request by L. A. Thurston, Minister of the Interior, made an official report on the subject of "unassigned lands" (Tr., p. 93, Ex. 1; Tr., pp. 319-333).

The report discussed at much length the interesting but academic question of law whether the title to unassigned lands was in the Government or in the heirs-at-law of Kamehameha III. The learned professor took the view that the title to such lands vested in the Government. We have not contended in this case that the title to unassigned lands is not in the Government. The point we make here is that in the exhaustive list of unassigned lands of the islands which was appended to the report the Ahupuaa of Kioloku was not included. This we regard as important evidence that the Government of the Monarchy did not lay claim to the Ahupuaa as an unassigned land. Prof. Alexander was for many years the head of the Bureau of Survey and a recognized authority on land titles. He was called upon by his superior in office to make a special report on the subject of "unassigned lands." The report shows on

its face that he did the work carefully and thoroughly. At the time he made the report there were in his possession, or in his office, three maps of Kau district: Lyman's, Brown's, and Monsarrat's. Lyman had classed Kioloku as private land; Brown classed it as Government, and Monsarrat as unassigned. In the fullness of his knowledge and experience, and familiarity with the subject Professor Alexander did not class Kioloku as unassigned land, which, as his report shows, he would regard as Government land. The conclusion would therefore seem to be unavoidable that the professor agreed with Lyman that Kioloku was privately owned. There is no evidence in the case that the Provisional Government or the Republic of Hawaii ever claimed this land. On the contrary each successive Government levied and collected taxes on the land as private land, and it was only after the present Government of the Territory had levied and collected taxes in the same way for thirteen years after its organization that it asserted a claim and instituted the present proceeding. The attitude of the past Governments of the islands with respect to the land in question ought to be regarded as most persuasive, if not absolutely conclusive, evidence of the status of this land as private land.

After the case had been closed, argued, and submitted, it was re-opened on motion of the Territory and a copy of the application of D. Kalakaua for

the settlement of the boundaries of seven parcels of land, including Kioloku, dated June 23, 1873, was put in evidence (Tr., p. 39). Following that, a stipulation as to certain agreed facts was filed (Tr., pp. 40-42). The application and the stipulation are set forth in full in the record. They need not be repeated here. The stipulated facts more than nullified whatever effect the statement in Kalakaua's application might otherwise have had. The stipulated facts showed the marked and startling difference between the status and treatment of the six tracts other than Kioloku and Kioloku itself, a difference which it was the duty of the Land Court to find a reasonable explanation for. One of the lands mentioned in the application, viz., Kamakamaka, cannot now be located or identified, showing how, in the lapse of time, former knowledge with reference to lands and titles in the islands has been lost or forgotten. One of the lands mentioned, viz., Mohakea, evidently never belonged to Keohokalole, for its boundaries were afterwards settled by the Commissioner on the application of Princess Ruth Keelikolani, tending to show that Kalakaua was not as well posted on the subject of land titles as might be supposed. The other five of the lands mentioned were consistently regarded and treated and dealt with as Government lands. Of the seven tracts of land only Kioloku was recognized as the property

of Keohokalole, and hence, under the partition deed of 1870, as Kalakaua's, and its boundaries settled upon the application in question, and this with the knowledge and acquiescence of the Government. This fact stands out in clear relief. It could not be easily brushed aside. It has not been satisfactorily met or accounted for by anything said by counsel for the Territory. What is the reasonable explanation of the evidence adduced? How could Kalakaua's application to the Boundary Commissioner and the further agreed facts showing the status of and treatment accorded the six tracts of land other than Kioloku, as compared with that of Kioloku, be sensibly and fairly accounted for otherwise than as held by the courts below (Tr., pp. 43, 45, 252)? Was Kalakaua right when he thought Keohokalole had not obtained an award of the land and everybody else was wrong in thinking that she had acquired the title? It reminds one of the old story of the lone juryman who "never saw eleven such stubborn fools in all his life." There would seem to be three possible theories of this matter, one of which is an unreasonable one and two are reasonable. The unreasonable one is the one asserted and relied on by the Territory, namely, that Kalakaua was right and everyone else was wrong. If Kalakaua was right, the land of Kioloku was unassigned land and belonged to the Government. Then why did

the Boundary Commissioner, with the acquiescence of the Government, recognize Kalakaua as its owner and settle the boundaries of the land upon his application? If Kalakaua was right and the land of Kioloku really belonged to the Government, why did the Government refrain from dealing with it as public property and parcel it out in smaller grants or divide it into homestead lots, as is shown to have been done with all the other of those lands except Mohakea, which was recognized as belonging to Keelikolani, and, possibly, Kamakamaka, which cannot now be positively identified? In short, why was Kalakaua's petition favorably acted upon only as to Kioloku if, as a matter of fact, it belonged no more to Kalakaua than did the other lands named? There must have been some explanation for the distinction made between Kioloku, on the one hand, and the remaining lands, on the other hand. We contend that either of the two theories mentioned in the decision of the Land Court is reasonable. One is that Kalakaua was mistaken and the surveyors and Government officials, who very evidently believed that Keohokalole had acquired the title, were right. This hypothesis would fully and satisfactorily account for the fact that Kalakaua was given a certificate of boundaries for the land, and the further fact that it has ever since been regarded and treated and taxed as private property.

The other is that upon the filing by Kalakaua of the application to the Boundary Commissioner an arrangement or settlement by way of compromise was entered into between him and the Government by which his title to Kioloku would be recognized and confirmed in consideration of his withdrawing or not pressing his application as to the other lands named, direct evidence of which arrangement or settlement cannot now be found (Tr., pp. 44, 45).

The doctrine of presumptions, upon which we rely, applies to contracts, settlements, and compromises as well as to the issuance of grants of land when, under the circumstances of any case, the making of a contract, settlement, or compromise, though there is no express evidence of one having been made, affords a reasonable and logical explanation of the state of facts shown in evidence.

In view of the array of facts and circumstances in evidence, the long-continued and undisputed possession of the land by Keohokalole and her several successors in interest can be explained, as the courts below found, upon only one reasonable hypothesis, and that is of an award of the title to her by the Land Commission, notwithstanding direct evidence of the fact has not been found.

In the case at bar it happens that the land involved is agricultural land. The principle of the common law on which we are relying, however, does not

take account of the character of the land whose title is in dispute. The rule applicable here would apply under similar circumstances to city property covered with valuable improvements.

In the trial of the case counsel for both sides endeavored, as the transcript shows, to save the time of the court and to abbreviate the record by admitting many facts, and by reading into the record excerpts from documentary evidence, with the result that the case has come from the Land Court upon a record of very reasonable proportions.

The lengthy quotation from former Judge Dole's article in the "Overland Monthly" (Brief, pp. 11-36), though interesting, throws no light whatever upon the case at bar. There is absolutely nothing in the history or legislation of Hawaii which would in any way tend to prevent the application of the common-law presumption of a transfer of title in a proper case, such as the local courts found this to be.

In different paragraphs of the brief for the appellant it is stated that this, that, or the other circumstance is not sufficient to authorize the presumption of a grant or award of title. (See Brief, p. 64, *re* collection of rent of Kioloku; p. 65, *re* payment of taxes; p. 73, *re* L. C. A. 9659; p. 75, *re* boundary descriptions; p. 83, *re* appearance of Government's representative before Boundary Commis-

sioner; p. 84, *re* boundary proceeding, and p. 85, *re* Alexander's report.) But, as already stated, the appellee did not rely upon any one item, but upon the aggregate of all the facts and circumstances shown in evidence.

A glossary of Hawaiian words is appended at the end of this brief.

THE LAW.

1.

The importance and far-reaching effect of presumptions are well known, but we desire to preface the citation of authorities having a more direct bearing upon our main contention in this case with reference to a few authorities which discuss the matter of presumptions in a broad way and show their wide application in the determination of legal controversies in our system of jurisprudence. We refer to:

1 Greenleaf, Evidence (14th Ed.), secs. 17, 32, 45.

State *v.* Wright, 41 N. J. L., 478, 482-4.

Carter *v.* Fishing Co., 77 Pa. St., 310, 315.

Williams *v.* Mitchell, 112 Mo., 300, 311.

Reed *v.* Earnhart, 32 N. C., 516.

McGrath *v.* Norcross, 78 N. J. E., 120.

Greenleaf says (sec. 45): "Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign agreeably to the maxim 'nullum tempus occurrit regi,' yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment." And in a note to that section it is said: "Application of the presumption to cases where a grant was implied against the sovereign in England has been made in" a number of cited cases, "and the same principle has been upheld in the United States in favor of the individual as against the state." That section was cited with approval in 159 U. S., 464.

The case of State *v.* Wright furnishes an interesting illustration. In 1758 the State of New Jersey entered into an arrangement with an Indian tribe by which a tract of land was acquired on which Indians were to reside. The legislative act which authorized the arrangement provided that the land should not thereafter be subject to any tax. In 1801, the Indians having gone to reside elsewhere, the legislature passed an act authorizing the sale of the land, and thereafter the State assessed the purchasers for taxes thereon. The Supreme Court held that the assessment was unlawful. In 1804, the legislature repealed the exempting act of 1758. The Supreme Court of

the United States declared the repealing act unconstitutional. Nevertheless the State in 1814 began to assess the land for taxes and continued to do so till 1877, when the matter was again taken into court in the reported case. The court said: "Why, within two years after this successful appeal to the highest tribunal of the country, the owners of these lands submitted to taxation has been the subject of much speculation, and as an historical fact is unaccounted for by the thorough research which has been given to the subject. The only answer which this court can give to the question is to declare the presumption of fact which legally arises from the circumstances which surround the case. To the law the answer will be complete and satisfactory; to history it will be mere inference of the existence of a fact without any absolute proof of it from contemporaneous sources. The case must be solved upon the doctrine of presumptions. * * * From this obligation the State attempted to release itself by the repealing act of 1804. Although the contract could not be receded from in this way, yet the fact that, after this act was declared to be void, the tax was again levied in 1814, and that the relators or their grantors, with full knowledge of their rights, paid the imposition, and have uninterruptedly continued to pay it annually since that time, without questioning the right to levy it, raises a conclusive presumption that by some con-

vention with the State the right to exemption was surrendered."

The theory that, even if the title to the land was, prior to the proceeding before the Boundary Commissioner, in the Government (which has nothing to support it beyond the mere fact that no award or grant has been found) it, by some arrangement or settlement made between the Government and Kalakaua, passed to the latter, is not only a possible one—it is a reasonable one. It would be the only hypothesis which could sensibly and logically account for the fact that Kalakaua's successors in the interest were left in unmolested possession through all the years by four successive governmental régimes and the land subjected to taxation as private property were it not for the fact that the presumption that the land had passed into private ownership arises partly from facts which long antedate Kalakaua's application to the Boundary Commissioner. And those facts, together with the rest of the chain of circumstances shown in evidence, complete the foundation for the presumption on which we rested our case.

2.

A grant from a sovereign may be presumed from long-continued peaceable possession of land, and where the proof of such possession is clear and is

supplemented by evidence of surrounding circumstances pointing to a notorious claim of private ownership and the recognition of that claim by the Government, all of which facts exist in the case at bar, there can be but one conclusion, and that is that the presumption must be recognized and applied.

Grimes *v.* Bastrop, 26 Tex., 310, 315.
Caruth *v.* Gillespie, 68 So. (Miss.), 927, 929.
Carter *v.* Walker, 65 So. (Ala.), 170.
State *v.* Dickinson, 129 Mich., 221.
Tracy *v.* R. Co., 39 Conn., 382, 393.
U. S. *v.* Chaves, 159 U. S., 452, 464.
U. S. *v.* Chavez, 175 U. S., 509, 518.

In 2 *Corpus Juris,* 290, it is said: "A grant from a sovereign may be presumed from long-continued peaceable possession of real property, accompanied by the usual acts of ownership, even as against the sovereign itself." It was so held by the United States Supreme Court in the Chaves and Chavez cases. Those cases did not turn upon the construction of any provision of the statute establishing the Court of Private Land Claims or upon any provision in the treaty with Mexico, but were determined upon a well-recognized principle of common-law jurisprudence. In the Chaves case the court said: "The principle upon which the doctrine rests is one of general jurisprudence, and is recognized in the Roman law

and the codes founded thereon." That passage was quoted with approval in the Chavez case.

Referring to those cases, counsel for the appellant say (Brief, p. 91): "It will be seen that the citations relied upon by the contestant in the case at bar are simply obiter dicta." But a careful reading of the opinions in those cases will show the contrary.

The case of U. S. *v.* Chaves was an appeal from a decree of the Court of Private Land Claims, established by an act of Congress of March 3, 1891. The petitioner's claim of title to the land in dispute was based on an alleged lost grant of a Mexican governor. The decree confirming the claim was affirmed by the Supreme Court. The principle applied in that case clearly applies to the case at bar. The court there said (p. 463): "Not only was there evidence of the existence of an original grant by the Government of New Mexico, and the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and enjoyment of this tract of land. * * * However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance

of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a presumptio juris et de jure whenever, by possibility, a right may be acquired in any manner known to the law. Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim nullum tempus occurrit regi, yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership."

The case of U. S. *v.* Chavez also was an appeal from a decree of the Court of Private Land Claims. The petitioner claimed under two Mexican grants. The claim was confirmed by the court below and its decree was affirmed by the Supreme Court. In that case two pieces of land were involved, or, more cor-

rectly, two cases (Nos. 38 and 39) were covered by the one opinion. (See the title of the case and the remarks of the court on page 517 of the report.) The basis of the title to the southern portion of the tract which was involved in case No. 38 was "a grant made on the 5th day of November, 1716, to Captain Antonio Gutierrez" (p. 510), while as to the northern portion of the tract which was involved in case No. 39 "the archives referred to and the documentary evidence are the same as in No. 38, except there is no grant" (p. 517). The discussion in the opinion of the court applied principally to the last case mentioned or, as the court stated in the beginning of its opinion, to the title which was "deficient in the support of direct evidence." The discussion, therefore, clearly applies in the case at bar. It was alleged in the petition that the original grant papers evidencing one of the grants had been lost or destroyed and could not be produced. It appeared, however, that the existence of a grant had been recognized in a certain judicial proceeding of distribution among heirs which might be compared to the partition deed in the case at bar, which was reported to the court in his petition for discharge by the administrator of the estate of Ane Keohokalole. It further appeared that the petitioner and his predecessors had been in possession of the land for over one hundred and thirty years.

though there were breaks in the chain of paper title. The fact that the possession there had been longer continued than in the case at bar does not differentiate the case as an authority, since, as shown by the decision in the Chaves case, twenty years' possession is enough. The court in its opinion said (p. 518): "The title asserted by appellees is deficient in the support of direct evidence. Is the deficiency supplied by the probative force of the possession of the land? Private ownership of the property with possession is claimed for over one hundred and thirty years before the cession of the Territory to the United States. A continuous possession is shown from some time prior to 1785, inferentially from 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico. Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the Territory to the United States no one questioned them. Succeeding to the power and obligations of these governments, must the United States do so? This is insisted by their counsel, and yet they have felt and expressed the equities which arise from the circumstances of the case. Whence arise those equities? That which establishes them may establish title. Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment in the

absence of rebutting circumstances, as formal instruments, or records, or articulate testimony. Not that formal instruments are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, Do such presumptions arise in this case, and do they solve its questions?" The court then quoted copiously from Fletcher *v.* Fuller, 120 U. S., 534, and U. S. *v.* Chaves, *supra,* and said (pp. 523, 524): "We think there can be but one conclusion in this case. The possession of the land began in wrong or began in right. If in wrong, it must be shown. The maxims of the law declare the other way. * * * Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose. * * * It is to this possession that the appellees trace, as we have seen, and the questions which can arise about it—from whom derived and the rightfulness or wrongfulness of it—depends upon principles already sufficiently discussed. It is enough to say that Clemente Gutierrez died in possession, and his possession was proof of ownership."

In the second Chavez case (175 U. S., 552), cited on page 97 of the opposing brief, there was no room for the operation of the presumption of a grant for

two very good reasons, which were pointed out by the court on page 563 of the report, namely, (1) that the plaintiff expressly claimed under a grant which had been issued by a body "which had no legal power to make it," and (2) that the period of possession fell short of the 20-year rule laid down in the Chaves case, since a period of only seventeen years' possession (1831 to 1848), had been shown. Either of those two facts was sufficient to defeat the claim. In the case at bar the evidence shows a continuous possession since 1861, and, inferentially, since a date prior to the close of the sittings of the Land Commission, in 1855. That case, therefore, is not an authority against us.

It is impossible, of course, to find cases which are exactly on all fours with the case at bar as to the facts involved. A duplicate of the history of Hawaiian land titles cannot be found. But the determining principle involved here is one of common law, and it is as fully applicable to a case arising in the courts of Hawaii as it would be in a case in a Federal, State, or English court. From the standpoint of the common law the facts shown in none of the cases quoted from (or cited), taken as a whole, presented any stronger claim to the application of the principle invoked than those of the case at bar. In the Chaves case there was some evidence that a grant had been made, but the court did not

rest its decision on that fact any more than on the fact of nearly sixty years' possession. In the Chavez case the period of possession was longer, but as to one of the tracts of land involved there was no evidence whatever that it had ever been granted by the Government. The court quoted with approval the paragraph from the Chaves case in which it was stated that twenty years' possession was enough. In neither of those cases was there such evidence as there is in this case, that early Government surveys showed that the land in dispute was regarded as private land during the time the Land Commission was sitting and shortly after; that in a court proceeding for the settlement of the boundaries of the land the Government had appeared and impliedly, at least, recognized the claim of title of the party in possession; that the Surveyor General of a prior government of the country reporting specially on "unassigned" lands had not claimed the land in dispute to be such, nor that successive governments for forty-three years had taxed the land as private property.

The authorities do not make proof of the destruction of the public records a prerequisite. A paragraph of the syllabus to the case of Valentine *v.* Piper, 22 Pick., 85, reads: "It is competent to the jury to presume a lost deed of real estate where, from long-continued and uninterrupted possession

and other circumstances, such a presumption can reasonably be made; and in such case the rule that a deed cannot be given in evidence unless registered does not apply; or it may be further presumed that the lost deed was registered and that the record has been lost or destroyed." The presumption does not rest on the idea that a grant was actually made and has been lost, but on the fact that one might have been made and the making of it would account reasonably for the circumstances, acts, and events which are shown to have transpired. The presumption is indulged for the purpose of quieting long-continued possessions. "The rule of presumption, in such cases, as has been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society" (120 U. S., 546).

The Supreme Court of the United States, in an early case, pertinently said: "Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate."

Lewis *v.* Marshall, 5 Peters, 470, 477.

3.

The presumption here relied on extends, not merely to the bare fact of the making of a grant or award, but to everything necessary to give it validity,

such as the issuance of it by proper authority and its recordation, if necessary.

"It will be sufficient ground for the presumption to show that by legal possibility a grant might have issued; and this appearing, it may be assumed, in the absence of circumstances repelling such conclusions, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law."

Williams *v.* Dowell, 2 Head, 695, 698, quoted with approval in Fletcher *v.* Fuller, 120 U. S., 534.

In U. S. *v.* Pendell, 185 U. S., 189, which cited with approval the Chaves and Chavez cases, the court said (page 198): "The evidence is sufficient not only to presume a grant, but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient within the requirements of the treaty" of 1853 with Mexico. Also that "possession under a grant, so long continued and so complete as is the case here, may well authorize the presumption that the lieutenant-governor (whose authority was questioned) was either a subdelegate or that he had been authorized or his act ratified by the governor and the grant duly recorded." And on page 199 the court said: "A record may in a case like this be presumed to have been made, just as well as the existence of a grant may be presumed.

* * * Taking all the evidence, there is room for the presumption of a record of the grant as well as that for the existence of the grant itself."

In Proprietors *v.* Bullard, 2 Met., 363, 367, the court said: "It was objected that such a deed must have been recorded in the parish books. But it is to be considered that when a lost deed is rightfully presumed from circumstances, they will also raise the presumption that whatever was necessary to give the deed effect, as acknowledgment, registration, or other act, was duly done."

4.

As to the nature and conclusiveness of the presumption. It is not necessary that the Land Court should have been satisfied that an award or grant was in fact issued by the Government. It is sufficient that the court believed it to be probable that an award or grant may have been made and was satisfied that the making of it is the only satisfactory hypothesis in view of all the circumstances.

"It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution."

Fletcher *v.* Fuller, 120 U. S., 534, quoted with approval in 175 U. S., 509, 521.

"It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant was ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have been issued."

Williams *v.* Dowell, 2 Head., 695, 697, quoted with approval in 120 U. S., 534, 548.

"Lord Coke says somewhere that an act of Parliament may be presumed; and of late it has been held that even in the case of the Crown, which is not bound by the statutes of limitation, a grant may be presumed from great length of possession. It was so done in the case of The Corporation of Hull and Horner, not that in such cases the court really thinks that a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact from a principle of quieting the possession."

Eldridge *v.* Knoll, 98 Eng. Rep. (reprint), 1050, per Lord Mansfield.

The application of these principles to the evidence in this case we think clearly required that the presumption should be invoked and applied for the purpose of quieting the long-held possession of the claimant and its predecessors in interest, and to that end whatever is necessary to give validity to its claim of title should be presumed, since there certainly was, under the evidence, the "legal possibility" that an award was made to Ane Keohokalole, the making of

which would solve all uncertainty and terminate all ground for dispute.

5.

Whether the presumption is one of fact or law is not entirely clear, and it makes little practical difference here, since disputed facts cannot be reviewed. Perhaps the proper view is that where the facts are in dispute or, if not actually disputed, are more or less equivocal and capable of more than one reasonable inference, the whole matter should be left to the jury (if it be a jury case), whereas if the facts are such as to permit of only one such inference, it becomes a pure question of law.

In the case of Valentine *v.* Piper, 22 Pick., 85, 94, Chief Justice Shaw said: "Such a question is a mixed question of fact and law to this extent, that the facts being found, it is for the court to advise the jury whether in their nature and quality they are sufficient to raise the presumption proposed, the weight of the evidence being for the jury."

In Brown *v.* Spreckels, 18 Haw., 91, 107, the trial court had submitted the question to the jury on the evidence. The Supreme Court said: "In our opinion the evidence was such as to permit, if not require, the jury to find against the theory of a lost grant." The court also pointed out that "this is not the case of an

absence of direct proof of a deed of the land in question from Pitman to Spencer in 1861, but the case of a proved deed which omits the land in question below Front street, although it includes land above Front street." It was, therefore, hardly a proper case in which to invoke the presumption of a lost conveyance.

It is a presumption "rather of law than of fact."

Crooker *v.* Pendleton, 23 Me., 339, 342.

It has been held to be a presumption of law, founded in the interest of the law in peace and order, for the purpose of protecting and quieting long-continued possession of land.

Folsom *v.* Freeborn, 13 R. I., 200, 207.
Central Coal Co. *v.* Penny, 173 Fed., 340, 343.
Hewling *v.* Blake, 70 So. 247, 248.
U. S. *v.* Chaves, 159 U. S., 452, 464.
U. S. *v.* Chavez, 175 U. S., 509, 522.

"We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be

instructed that it is their duty to presume such a conveyance, and thus quiet the possession."

Fletcher *v.* Fuller, 120 U. S., 534, 550.

That case was referred to in Brown *v.* Spreckels, *supra,* and the paragraph just quoted would have had a closer application to the case at bar if this case had been tried before a jury, and, we submit, it would have required such a direction as was there suggested.

The "presumption does not operate like the statute of limitations, and bar a right which is known to exist; or like laches, which deprives one of the right which did exist. It operates as evidence, and establishes the conclusion that the right which did exist has been duly relinquished by the possessor of it."

U. S. *v.* Devereaux, 90 Fed., 182, 187.

6.

As to the payment of taxes: The payment of taxes on land is strong evidence of a claim of title by one in possession in cases between individuals, especially where, as in this case, it has been long continued.

O. R. & L. Co. *v.* Kaili, 22 Haw., 673, 678.

Holtzman *v.* Douglas, 168 U. S., 278, 284.

Such payment is also potent evidence against the Government which has levied and collected taxes upon

land, as it practically amounts to an admission of title in the party who has paid the taxes.

In the case of Smith *v.* City of Osage, 80 Iowa, 84, 88, 89, the court said: "In the case before us it (the city) has permitted the plaintiff, and those under whom he claims, to occupy the land, which has never been subject to public use, and it levies and collects city taxes thereon. The law regards this as a declaration by its acts that it holds no claim to the land, and as an abandonment of all claim to the public use of the land. The city may vacate streets and other public lands and restore them to private owners by proper action. The same end may be attained by abandonment and non-use, and by taxation, and in other ways treating the land as private property. The city will be estopped to set up any claim to land to which the right of the public use has been abandoned by subjecting it to taxation as private property."

In the case of Busby *v.* R. Co., 23 S. E. (S. C.), 50, 53, which was an action for damages against a railroad company, the plaintiff was put to the necessity of proving title to his land. He relied upon evidence of adverse possession for the period of fifteen years, but there was no evidence that the land had ever been granted by the State. It was shown, however, that the plaintiff had paid taxes on the land during that period. On that point the court said: "Now, the fact that the plaintiff had been paying taxes on the land

for a number of years * * * and the further fact that it did not appear that the State was setting up any claim to this land do afford evidence—whether sufficient or not it was for the jury to determine—that the State had parted with its title to the land, for certainly we would not be justified in assuming that the State would collect taxes on its own land."

In the case of Jover *v.* Insular Government, 221 U. S., 623, 633, which originated in the Court of Land Registration of the Philippine Islands and involved a controversy between the petitioner and the Government over certain tide lands, the petitioner claimed title under a grant made in 1859 by the Spanish Governor General. The respondent contended that the Governor General had no authority to make the grant. As in the case at bar, the title had not been disputed by the former government of the country, but on the contrary, as in the case at bar also, the Government had imposed taxes on the land as private property. With reference to that point the court said: "The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property. This is persuasive proof

that in making the grant the Governor General did not exceed his authority."

The fact that in that case the validity of the grant was disputed, and not its issuance, does not differentiate it from the case at bar so far as concerns the principle involved. The point of the matter is that by levying and collecting taxes on land the Government admits that the land does not belong to it, but that the title to the land has passed into private ownership.

Where taxes have been collected upon land for a long period of time by former governments of the country, it is no proper function of a new government to attempt to disturb the possession and uproot the title of the party from whom taxes have been so collected, and other facts and circumstances indicate strongly that title had been obtained from the Government, merely because evidence of the original award, which might have been issued over sixty years before the title was questioned, cannot be found. (See Carino *v.* Insular Government, 212 U. S., 449, 460.)

7.

The presumption of the common law is in force in Hawaii unless it was repudiated by judicial decision prior to 1893.

Revised Laws of Hawaii, 1915, sec. 1.

On behalf of the appellant it is contended that the presumption does not apply as against the Territory of Hawaii. This proposition we emphatically deny.

The case cited in support of the contention and which it is said "settled the doctrine once and for all in this Territory" (Brief, p. 101) is Kahoomana *v.* Minister of the Interior, 3 Haw., 631.

An examination of that case, however, shows that it has none of the earmarks of a case involving the common-law presumption. It was adverse possession and the statute of limitations that was relied on there, and, of course, unsuccessfully. On page 639 the opinion states that "counsel for the plaintiff, after their case had closed, showed the court a copy of an application for an award of this lot by Namauu. The Land Commission, however, did not award it; and by the force and effect of the statutes above quoted it must be considered to still belong to the Government." In the trial court it had been admitted or proven that no award had been issued for the land in dispute. There was no possible basis, therefore, for a claim under the common-law presumption. The plaintiff showed possession of the land from previous to the year 1829 to the year 1872, part of the period being prior to the Land Commission and part of it subsequent. As to the possession prior to the Land Commission, the court said (p. 640): "But, as against the Government, a grant can-

not be presumed or inferred from long possession in view of the law which required claimants of land to present their claims to the Land Commission for confirmation or rejection." Then, referring to the possession subsequent to the Land Commission the court said: "But it may be urged that the length of adverse possession since the closing of the Land Commission creates the inference of a grant. To this the answer is complete. There is no prescription against the State." The court also took the trouble to explain that "The theory of titles by prescription is that the holding possession of an estate openly and adversely for a certain length of time creates an inference that there was a grant from the adverse claimant or his ancestors, and the statute of limitations forbids the adverse claimant from setting up against this long-continued possession the fact that there was no grant." The court then quoted from two U. S. Supreme Court cases to the effect that the statute of limitations does not run against the State, and concluded its opinion saying: "For the reason, therefore, that the mere possession of this lot by the plaintiff and her ancestors makes no presumption of a grant as against the Government, judgment must be rendered for the defendant."

In referring to the "presumption" of a grant the court had in mind the principle of prescription upon which the statute of limitations is based. In many

jurisdictions the view prevails that the statute of limitations is a statute of repose and constitutes not merely an arbitrary bar to the assertion of the paper title, but operates to transfer the title to the adverse possessor. The other (and older) view is that the effect of the statute is to create the presumption of a grant. That is the view which has been taken in Hawaii and has found expression in the case of Do Rego *v.* Halama, 24 Haw., 750, an action of ejectment, where the court said: "Where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land the presumption of a deed is conclusive."

Warvelle, in his work on ejectment, claims that this is the logical view, although it is a matter of little practical importance. In section 418 of that work the author says: "The old theory (of presumption) is supported by sound legal reason, while the later notion, that mere occupation with the presumed acquiescence of the owner is itself an actual transfer of title, is opposed to all of the rules of conveyancing as well as the general theories of the law respecting the transfer of proprietary rights. However, the theory involved is a matter of minor importance, for under either theory the result is the same."

In the light of all this, then, the reference in the Kahoomana case to a presumed grant is easily under-

stood. That case did not purport to deal with the common-law presumption, but solely with the statutory presumption.

The distinction between the common-law presumption of a lost grant or conveyance and adverse possession under the statute of limitations is pointed out in 2 *Corpus Juris,* sec. 650, pages 288, 289. Under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common-law presumption is a rebuttal one, and it was so regarded and treated in the trial of this case in the Land Court.

In Jones-Horwitz, Evidence, sec. 77, it is said: "The party relying on his possession may, of course, call to his aid the statute of limitations where it is applicable, and if he relies upon the statute, the proofs must show compliance with its provisions. But the statute of limitations does not supersede the common-law presumption, and, if this is relied upon, possession for less than a period prescribed by the statute, may, with other cogent circumstances, sustain the claim of conveyance or a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not definite, but depends on its peculiar circumstances. It may be necessary to seek the aid of this presumption in some cases where the statute of limitations does not apply, as where it is urged against the state."

On page 101 of the opposing brief it is said that the Kahoomana case "has never been reversed and has been cited with approval in many cases."

In Territory *v.* Puahi, 18 Haw., 649, 652, the Kahoomana case was cited as authority to the point that "upon no theory could a claim by prescription go back of the Mahele."

In Galt *v.* Waianuhea, 16 Haw., 652, 658, it was said that: "The proposition that title by adverse possession presumes a grant and that such proposition cannot be entertained against one incapable of granting (1 Cyc., 1113) was approved in Kahoomana *v.* Minister of the Interior, 3 Haw., 635, 640."

In the case of Estate of Kekauluohi, 6 Haw., 172, the Kahoomana case is cited merely to the point that the Land Commission was a court having jurisdiction to consider claims to land arising prior to December 10, 1845.

In the case of Atcherley *v.* Lewers and Cooke, 18 Haw., 625, the Kahoomana case is only incidentally referred to as one which discussed the statutes relating to the Land Commission.

And while the Kahoomana case has been cited as an authority for the proposition that the statute of limitations does not run against the Government, it has never been cited as holding that the common-law presumption of a grant or other transfer of title was not in force in Hawaii.

In Kunewa *v.* Kaanaana, 18 Haw., 252, 253, it was said: "As early as 1875 this court held that the statute of limitations of real actions does not run against the Government (Kahoomana *v.* Minister of the Interior, 3 Haw., 631)."

In Thurston *v.* Bishop, 7 Haw., 421, the report shows (p. 424) that: "It is admitted by the defense that no claim for this land on behalf of Lot Kamehameha was presented to the Land Commission according to law." No question as to the presumption of an award, therefore, could have arisen in that case. The principal question there was whether the limitation of time in which claims could be presented to the Land Commission applied to Lot Kamehameha during his minority. It was held that it did. The court then quoted from the case of Lindsay *v.* Miller's Lessee, 6 Pet., 666 (which was one of the cases cited in the Kahoomana case), to the effect that it is a well-settled principle that the statute of limitations does not run against the State, and said: "This was adopted in Kahoomana *v.* Minister of the Interior, 3 Haw., 635."

In Minister of the Interior *v.* Parke, 4 Haw., 366, 369, the court said: "In the case of Kahoomana *v.* Minister of the Interior, 3 Haw., 635, it was held that the statute of limitations of real actions does not run against the Government."

It seems to us that this court will surely adopt the

view of the Kahoomana case which was taken by the local courts.

8.

Although the evidence in this case showed that Ane Keohokalole was in possession of Kioloku as far back as 1861, and we consider the length of the period of possession to have been more than ample to support the presumption of title, the law will permit the inference of even prior possession.

In 2 Chamberlayne, Evidence, sec. 1030, p. 1230, it is said: "To prove the existence of a fact or of a continuous state of things at a given time, is often, in itself, practically impossible. The most which can be done is to show its existence at a previous or subsequent period and ask the tribunal to draw from this proof an inference that it existed at the time in question."

See also:

Laplante *v.* Mills, 165 Mass., 487, 489.

Brooke *v.* Winters, 39 Md., 505, 509.

9.

The peaceable possession of land is itself evidence of title in the party in possession.

Carino *v.* Insular Government, 212 U. S., 449, 460.

Hazard Powder Co. *v.* Volger, 58 Fed., 152, 154.

Mygatt *v.* Coe, 147 N. Y., 456, 462.

10.

On page 88 of the opposing brief it is said that the rule that execution of a deed in compliance with an order of court will be presumed was repudiated in the Lewers & Cooke case, 18 Haw., 625. It is a side point of little or no importance, but we do not care to let the misstatement pass unchallenged. In the case referred to the court said (page 632): "There is no record that the conveyance decreed was ever made, David Kalakaua and his successors apparently relying upon the decree and their possession thereunder." There was no reference to or repudiation of any presumption there. That case itself was repudiated by the Supreme Court of the United States in 238 U. S., 119, 136.

11.

The evidence in regard to the proceeding before the Boundary Commissioner upon the application of D. Kalakaua for the settlement of the boundaries of the Ahupuaa of Kioloku (Tr., pp. 102-105, Ex. 5), wherein the Government, though represented, did not question Kalakaua's ownership, was relevant and material under the rule that either party to an action may show that the other has failed to assert a claim which he now makes, though an opportunity

to assert it was offered, or now claims a certain right though in the past he has done acts which were inconsistent with the actual existence of the right now set up.

2 Chamberlayne, Evidence, secs. 1393, 1395.
Eaton *v.* Telegraph Co., 68 Me., 63, 66, 67.
Stanwood *v.* McLellan, 48 Me., 275, 278.
O'Donnell *v.* Kelsey, 10 N. Y., 412, 417.
Springer *v.* Drosch, 32 Ind., 486.
Garey *v.* Sangston, 64 Md., 31.
Allen *v.* Westbrook, 16 Lea, 251, 255.
Townsend *v.* Scurlock, 44 Tex. Civ. App., 141.

12.

Although the general subject of presumptions at common law is a doctrine of general jurisprudence, in the application of which this court would be entirely free to form its own judgment, yet in the case at bar the application of the presumption of a transfer of title growing out of proof by secondary evidence is so complicated with purely local conditions and so involved with Hawaiian history and procedure and matters of which the local courts would take judicial notice, that there is every reason for attributing unusual weight to the opinions of the Hawaiian courts. The Supreme Court of the United States, in a Hawaiian case, said: "The

contentions thus presented have intricate character and can only have clear comprehension in local experience and understanding and are best determined by local interpretation and the decisions of the courts on the spot."

Kapiolani Estate *v.* Atcherley, 238 U. S., 119, 136.

It is admitted on page 10 of the appellant's brief that "From what has already been said, it will appear to the court that the case at bar involves a study of the evolution of Hawaiian land tenures, as without such study many things appearing in the record must be incomprehensible." The reason for applying the rule adopted by the Supreme Court is, therefore, obvious.

ALLEGED ERRORS.

We will notice the assignments of error in the order in which they have been referred to in the brief for the appellant.

Assignments Nos. 8 and 9.

These refer to the rulings of the Supreme Court of Hawaii to the effect that the evidence adduced by the claimant "irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole," and

that it was "sufficient to sustain the judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced."

We do not believe that this court will review the findings of the Land Court, or will look into the evidence any further than will enable it to say, as the Supreme Court said, that the findings were sustained by the evidence.

It is contended (Brief, p. 47), that an examination of the records fails to show the existence of any award, grant, or patent affecting the land in question, and the direct examination of the Government's searcher is quoted at length. The cross-examination of the witness is not referred to, although it was the basis of the finding of the Land Court that "there remains the possibility that evidence of an award of Kioloku to Keohokalole actually exists in the records of the Land Commission."

The statement (Brief, p. 53) that "if any grant had actually been made, the evidence of such grant would naturally be rather with the contestant than with the petitioner," is negatived by the facts that the records of the Land Commission were kept in the office of the Minister of the Interior (Brief, p. 41), and that all patents are recorded in duplicate in the same office of the Government (Brief, p. 39).

This case, therefore, falls within the rule recognized in United States *v.* Denver, etc., R. Co., 191 U. S., 84, 92, that when "the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative." But the case at bar did not turn upon any such narrow question as the burden of proof.

On page 52 of the appellant's brief reference is made to the fact that the report of the examiner of titles, an officer of the Land Court, was adverse to the claimant. The conclusion of the examiner of titles, however, was not evidence in the case.

In re Pa Pelekane, 21 Haw., 175, 185.

On page 54 of the appellant's brief it is contended that the absence of an award, patent, or grant is proved from the fact that there is no Mahele of the land to Ane Keohokalole.

There was no statute, however, which required a Mahele to be in writing or recorded. Indeed, there was no law which required the Mahele itself. It was an ultra-legal proceeding, and the Land Commission could have performed its functions under the act of 1845 even if the Mahele had never taken place. Reference to the Mahele of Kioloku to Keohokalole could more easily have been omitted from the records of the Mahele than could reference to an award of the title have been omitted from the records of the Land Commission, yet that was quite possible.

It is incorrect to say (see Brief, p. 55) that "without a Mahele of the land to the chief there could be no award by the Land Commission," and that "the absence of such a Mahele constitutes absolute proof that there was no award of the Land Commission."

The great Mahele did not confer title to the lands therein set apart to the chiefs. In order to obtain title to the lands it was necessary for the chiefs to present their claims to the Land Commission under the statute of 1845. That commission was given jurisdiction to adjudicate all claims to land arising prior to the enactment, including the claims of chiefs.

Estate of Kekauluohi, 6 Haw., 172.

The awards made by the Land Commission marked the commencement of legal titles to land in Hawaii.

Kenoa *v.* Meek, 6 Haw., 63, 67.

In re Pa Pelekane, 21 Haw., 175, 185.

This is admitted on page 40 of the appellant's brief. There was no law which prevented the Land Commission from awarding title to land in the absence of a Mahele. As a matter of fact, the great bulk of the upwards of eleven thousand awards made by the Commission were of lands which were not enumerated in the Mahele.

Furthermore, the rule, hereinabove referred to, that where the circumstances are such as to warrant the presumption of a grant from the Government

everything necessary to have been done to give it validity will be presumed to have been done would apply to a Mahele, if that were necessary. (See Fletcher *v.* Fuller and United States *v.* Pendell, *supra.*)

The same may be correctly said in regard to action by the Privy Council in cases of direct grant, referred to on page 55 of appellant's brief, and as to Mahele awards by the Minister of the Interior, referred to on page 56 of the brief.

On page 58 of appellant's brief it is pointed out that in the various mesne conveyances of the land of Kioloku there was no statement of the derivation of title. Other lands were conveyed by the deeds referred to, but it does not appear that Kioloku was treated any differently from them. There would seem to be no force in the contention there made.

The same may be said as to the point made on page 60 of appellant's brief in regard to the conveyance in trust to C. R. Bishop by Keohokalole and her husband. In Hawaii, as elsewhere, title to land passes by quit-claim or other form of deed without stating the derivation of title, and the failure to state such derivation casts no reflection upon the title.

The statement contained in the application of D. Kalakaua to the Commissioner of Boundaries on June 23, 1873, has been so fully discussed hereinabove

and was so completely disposed of in the decisions of the two local courts that we think no further comment is necessary.

It is said (Brief, p. 62) that Kalakaua's admission is entitled to the greatest weight. But the evidence was weighed by the trial court, and it will not be reweighed by this appellate court.

Pages 63 to 86 of appellant's brief contain a discussion of the evidence for the claimant, with criticisms of its weight and comments upon its alleged weakness which would seem to require no reply from the appellee, since this is not a general appeal which would bring up the facts for review. However, we deem it advisable to make some comments thereon.

On page 63 of the brief it is noted that there is nothing in the accounts of C. R. Bishop which were filed in the probate court to show that the land of Kioloku there mentioned is the land in dispute in this case. We say that the identity of name is evidence of the identity of the land. If there is another land named Kioloku in the Hawaiian Islands it was for the petitioner to prove it. There was no such evidence. The fact that the trustee collected and accounted for rents from the land of Kioloku, coupled with the fact that the partition deed of 1870 mentions Kioloku as one of the lands which was inherited by the heirs of Keohokalole, is ample evidence of identity.

On page 64 of the brief counsel say that they have been able to find no inventory of the land in the record of the probate court. But the administrator of the estate of Keohokalole had no jurisdiction over the real estate of the decedent, except so far as it was necessary to sell portions thereof to pay her debts.

Estate of Kaiena, 24 Haw., 148.

It is said (Brief, p. 64) that Ane Keohokalole may have received permission from the King and chiefs to use the land. That is inconsistent with the appellant's claim that Kioloku was Government land, since in that event the King and chiefs would have had no authority to give such permission. If Martin had rented the land the records of the Interior Department should show the execution of a lease and the receipt of rent. No such evidence was adduced.

On page 65 it is said that the occupants of the land would be ready and willing to include the land of Kioloku in their assessment, expecting thereby to fortify their position. But under the law the levy and assessment for taxation were made by the tax assessor, and he included therein the land of Kioloku, and the Government took the money. On the same page of the brief it is admitted that the Government never collected rent for the land, and this is a potent fact against the Territory's present claim of title.

On page 66 reference is made to the diagram in Award 9659, which shows that the kuleana was surrounded by konohiki land, referring to the land in dispute, and there follow quotations from the testimony concerning the meaning of the word "konohiki." We believe the decision of the Supreme Court as to the meaning of the word as an adjective conclusively settled that point (Tr., p. 249).

On page 71 it is said that the surveyor who surveyed the kuleana and designated the surrounding land as "konohiki" was not describing Kioloku and was probably ignorant of its title. And in this connection the case of Rose *v.* Yoshimura is cited. That was the common case of an overlap of awards, and the court merely held that the earlier award must prevail over the later, irrespective of the date of the survey of the land. The case is not in point. The evidence received in the case at bar was relevant both upon reason and authority. The description in the award cannot properly be said to be merely the work of the surveyor. The grantor in a deed could not be heard to say that the description of the land conveyed was not his description, but only that of a surveyor. It is the description of the Land Commission itself. The evidence contained in such old documents is certainly much more reliable than any oral testimony witnesses now living might give on such a subject. For this reason it was expressly held in the case of

In re Pa Pelekane, 21 Haw., 175, 186, that "Land Commission Award 8559 to Kanaina, dated March 31, 1855, describing a piece of land at Lahaina purporting to adjoin Government land which it is claimed is the land in dispute would be admissible if supplemented by testimony showing its location to be as claimed. It would tend to prove the boundary of Pa Pelekane along the line described, and, what perhaps is more important from the standpoint of the Territory, it would go to show that the land in dispute had not been previously awarded by the Land Commission." In that case the Territory successfully urged the rule which we now rely upon. In the case at bar the documentary evidence was supplemented by the testimony of Wright, the surveyor, who testified to the respective situations of the lands and showed the location of L. C. A. 9659 within the Ahupuaa of Kioloku (Ex. 9). The rule also applies to the other documentary evidence referred to on page 74 of appellant's brief.

Assignment No. 6.

This relates to the ruling made by the Supreme Court that the proceedings had upon the petition before the Boundary Commissioner strongly refute the idea that no award of Kioloku had been made to Keohokalole. This point has been amply discussed

erein and was carefully considered by the courts elow. So far as Kalakaua's petition is concerned ie statement contained therein was offset by ie contrary recital in the partition deed to hich he was a party. In the proceeding referred the Government of the monarchy made such clear admission as to the ownership of the land at time when its true ownership was doubtless well nderstood that the courts ought not to tolerate a ontrary claim on the part of the present Governent made for the purpose of disturbing a peaceable ossession so long maintained by Keohokalole's sucessors in interest under the circumstances shown by ie evidence in this case.

The Supreme Court very aptly said (Tr., p. 251): What took place before the Boundary Commisioner was entirely inconsistent with any other theory han that Kalakaua was recognized by the Boundary Commissioner, the King and the Government as the ightful owner of the property."

On page 82 of the appellant's brief the question is sked, "Who was Martin?" A sufficient answer ould be that it is entirely immaterial at this late day ho Martin was.

The bald statements made on page 83 of the brief hat "There was no power in Mr. Martin to bind the Government;" that "There is no proof that the Hawaiian Government was given notice of the petition

of Kalakaua or took any part in the proceedings," and that the Commissioner "was not required to give notice to the Government that the petition of Kalakaua had been filed," are refuted by the record.

Counsel for the appellant admit (Brief, p. 83) that the Commissioner was required to give notice of the proceeding to the owners of the adjoining lands. The judge of the Land Court correctly said that "The respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku" (Tr., p. 38). The evidence was uncontradicted that the land of Kaunamano belonged to the Government. Hence the Government, as shown by the Commissioner's record (Tr., p. 104), was notified and appeared by agent, the only manner in which it could appear. The presumption of regularity applies, and after the lapse of more than forty years the record is conclusive evidence that the Government was notified and that Martin was authorized to represent it. The Government cannot stand by for half a century and after the witnesses have died off assert a stale claim and complain that the claimant has not made more specific proof.

We desire to call attention to the rule that where the record of an inferior court declares the ascer-

tainment of the jurisdictional facts the declaration is conclusive.

Raymond *v.* Bell, 18 Conn., 81, 88.
Pelters *v.* McClannahan, 52 Ala., 55, 60.
Dyckman *v.* Mayor, 5 N. Y., 434, 440.
Comstock *v.* Crawford, 3 Wall., 396, 403.

This rule was applied in Hawaii to proceedings before a Boundary Commissioner in the case of Keelikolani *v.* Lunalilo, 4 Haw., 627, 629, where the court said: "The statute does not point out how parties shall be notified or proof of notification made or recorded. Personal service is not necessary under it. The record recites that all the adjoining owners were notified. This is presumptive proof, and, after being unquestioned for nearly ten years, we must hold it conclusive."

On page 84 of appellant's brief counsel say: "We consider it a great misfortune that we were not allowed to show that at a later date Professor Alexander did become aware of the existence of Kioloku, and classified it as unassigned land." No evidence that Professor Alexander ever classified Kioloku as unassigned land was offered at the trial of this case. Petitioner's Exhibit E for identification, to which reference is made, was rejected because it bore no signature or other evidence of authenticity, and it was in no way connected with Professor Alexander

(Tr., p. 220). No exception was noted to the ruling of the trial judge, nor is there an assignment of error in that connection before this court.

On page 85 of the brief it is said that the attorney general during Kalakaua's reign "held office at his (the King's) pleasure." That is not true as to the time subsequent to July 6, 1887. Article 41 of the constitution granted on that date provided that the cabinet, including the attorney general, "shall be removed by him only upon a vote of want of confidence passed by a majority of all the elective members of the legislature, or upon conviction of felony" (Thurston's Fundamental Law of Hawaii, p. 186). We remember that some able and fearless lawyers held office as attorney general during the period referred to by opposite counsel, and it is a matter of history that by the constitution of 1887 the King's monarchical wings were so severely clipped that thereafter no one had any reason to fear him, and there was no evidence in the case that the mild and jolly King was ever feared by anybody. The suggestion that no attorney general "had the temerity to attack the monarch's deed" has nothing to support it.

The statement made on page 99 of the appellant's brief that "Our records are complete, and there has never been any destruction of public documents in the Hawaiian Islands similar to that in New Mex-

ico," is not sustained by any evidence in the case. It is a matter of history that when Kalakaua was elected King, in 1874, a riot took place in Honolulu, during which the capitol was ransacked. Whether or not any public documents were destroyed at that time is not shown by any evidence in the case.

The case of Kapuniai *v.* Kekupu, 3 Haw., 560, cited in this connection, has no bearing on the case at bar. The rule concerning the proof of the contents of a lost document has no relation to the presumption of a transfer of title arising out of circumstantial evidence.

Assignment No. 5.

This relates to the observation made by the Supreme Court that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the State as well as against it. The remark, though sustained by authority, was *obiter,* and requires no notice. The discussion in the appellant's brief under this head has no relation to the subject-matter of the assignment.

Assignment No. 10.

This deals with the ruling of the Supreme Court that the case of Kahoomana *v.* Minister of Interior did not abrogate the rule of the common law with

reference to the presumption here discussed. That point has been fully covered above, and need not be further enlarged upon.

Assignments Nos. 1, 2, 3, 4, and 7.

These have all been covered by preceding discussion.

We observe a typographical error on page 253 of the record. In the 5th line from the bottom the word "not" should read "now."

We have shown by indisputable authority that it is not necessary in a case of this kind to convince the court that title by a recorded instrument was in fact acquired by the claimant. The common law presumption is founded upon the inability of the party to prove that, and all that is necessary to show is what the claimant showed in this case, namely, a set of circumstances which is consistent with the theory that title had been acquired from the Government and inconsistent with the theory of continued Government ownership. It would be difficult to imagine a stronger case of that kind than has been made out in the case at bar. The claim set up by the Territory is a stale one, and as such is one which will not commend itself to a court of justice.

In conclusion, we confidently submit that the decision of the Land Court, in so far as it dealt with

facts, was supported by the weight of ample evidence, and so far as it applied rules of law, it was fortified by the decisions of courts of the highest authority. It was upheld by an unanimous Supreme Court. We contend that no error has been shown and that the decree appealed from should be affirmed.

Respectfully submitted,

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GLOSSARY.

Aina.—Land.

Ahupuaa.—The largest unit of land subject to separate or independent award of title.

Aupuni (noun).—Government.

Aupuni (adjective applied to land).—Government land.

Ili.—The second largest unit of land subject to separate or independent award of title.

Konohiki (noun).—The possessor of a large parcel of land (an ahupuaa or ili). In feudal times, the chief who held under the King; since 1848, the chief to whom the land had been given or awarded.

Konohiki (adjective applied to land).—Land given or awarded to a chief—*i. e.,* "Aina konohiki" (land of a chief) as distinguished from "Aina aupuni" (Government land).

Kuleana.—The smallest unit of land subject to separate or independent award of title.

Mahele.—Division. The Great Mahele was the division of lands made between the King and chiefs, whereby the King surrendered his feudal rights and enabled the chiefs to acquire title in fee to the lands held by them prior to December 10, 1845.

(3031)